IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEVEN G. INZAINA, Plaintiff, v. FEDERAL RESERVE BANK OF PHILADELPHIA, Defendant.	Civil Action No.97-1107

Gawthrop, J. April , 1998

M E M O R A N D U M

Before the court in this employment discrimination and retaliation case is the Summary Judgment Motion of Defendant, Federal Reserve Bank of Philadelphia. Plaintiff has asserted a claim under Title VII of the Civil Rights Act, 42 U.S.C. § 2000 et seq., alleging that he was discriminated against on the basis of his sex because defendant bypassed him for a promotion in favor of an allegedly less qualified female co-worker. Plaintiff also claims that, upon learning of his filing a claim with the EEOC, based on the alleged discrimination, the defendant retaliated against him by creating an intolerable work environment, forcing plaintiff to transfer to another department. Defendant has moved for summary judgment on both claims. Upon the following reasoning, Defendant's motion will be denied.

I. Background

Both briefs are chock full of assertions of fact. I shall here seek to distill only the most pertinent, not in dispute. Plaintiff, a white male in his mid-thirties, worked for the Federal Reserve Bank of Philadelphia from February, 1986, through December, 1997, filling various positions within the Financial Statistics Division, beginning as an Analyst in the Deposits Unit and advancing to Reports Coordinator. Throughout his employment, he received a number of awards and commendations. In 1987, Denise Weist began working in the Regulatory Unit of the Financial Statistics Division, advancing to the position of Reports Coordinator for the Unit in October, 1994, a position she held until May, 1995. She, too, was recognized for various achievements during her employment.

In the late 1980s, the Federal Reserve System's Board of Governors directed the Financial Statistics Division to improve the Deposits Unit. The Statistics Division was thus re-organized and re-structured so that, in the spring of 1995, the position of Manager of Financial Services became available. To that position, Denise Weist was promoted.

In January, 1997, after working under Weist for approximately a year and a half, plaintiff transferred to the Checks Department of the Bank, where he worked until December,

1997, when he left the Bank's employ.

Plaintiff alleges that Weist got the job because of her gender and that he, the more qualified candidate, was denied the post because he is male. Defendant counters that Weist had a proven record of ability and accomplishment that clearly identified her as the most worthy candidate for promotion. Defendant thus argues that plaintiff has failed to make out a prima facie case of gender discrimination, as well as has failed to set forth facts evidencing any retaliation against plaintiff for filing an EEOC claim. Upon those grounds, defendant moves for summary judgment.

II. Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Unless evidence in the record would permit a jury to return a verdict for the non-moving party, there are no issues for trial, and summary judgment becomes appropriate. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In considering a motion for summary judgment, a court does not resolve factual disputes or make credibility determinations, and must view facts and

inferences in the light most favorable to the party opposing the motion. Siegel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125, 1127 (3d Cir. 1995). The party opposing the summary judgment motion must come forward with sufficient facts to show that there is a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

III. Discussion

A. Sex Discrimination

A plaintiff can create a triable issue of discrimination through either direct or circumstantial evidence. When, as here, there is an absence of direct evidence, plaintiff must meet the three-prong, burden-shifting test originally set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a race discrimination case, as it has been modified and applied in discrimination cases based on sex. Under McDonnell and its progeny, the burden first falls on the plaintiff to establish a prima facie case of discrimination. If a prima facie case is shown, the burden shifts to the defendant, who must articulate a legitimate, non-discriminatory reason for the employee's rejection. Once articulated, the burden shifts back to the plaintiff, who must show that the defendant's stated reason for plaintiff's rejection is pretextual. Id., at 802.

Under the traditional burden-shifting analysis, a sex discrimination plaintiff may establish a prima facie case of discrimination by showing that he is a member of a protected class, that he was qualified and rejected for a position, and that non-members of the protected class were treated more favorably. See Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 523 (3d Cir. 1993). However, as both parties acknowledge, courts have split as to whether this is the appropriate standard to establish a prima facie case in a reverse discrimination action, where the plaintiff is not a member of a socially disfavored or protected class, but rather belongs to a traditionally favored class. Compare Hill v. Burrell Comm. Group, Inc., 67 F.3d 665, 668 n.2 (7th Cir. 1995)(applying McDonnell standard); Wilson v. Bailey, 934 F.2d 301, 304 (11th Cir. 1991)(same); and Young v. City of Houston, 906 F.2d 177, 180 (5th Cir. 1990)(same), with Reynolds v. School Dist. No. 1, Denver, Colorado, 69 F.3d 1523, 1534 (10th Cir. 1995)(applying a heightened standard); Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 801 (6th Cir. 1994)(same); and Parker v. Baltimore and Ohio R.R. Co., 652 F.2d 1012, 1017 (D.C. Cir. 1981)(same).

The heightened standard for reverse discrimination cases was originally set forth in Parker. The heightened standard alters the first prong of the McDonnell prima facie test and requires a plaintiff to show that "background circumstances support the suspicion that the defendant is that unusual employer who

discriminates against the majority." Parker v. Baltimore and Ohio R.R. Co., 652 F.2d 1012, 1017 (D.C. Cir. 1981). As I have noted previously, "[i]n cases of reverse discrimination, the Third Circuit has not spoken, and the other Circuits are not in agreement, on what constitutes the first prong." Wein v. Sun Company, Inc., No. Civ. A. 95-7646, 1997 WL 772810 (E.D. Pa. Nov. 21, 1997). Not surprisingly, the disparity in approaches exists even within the bounds of this court. Compare Davis v. Sheraton Society Hill Hotel, 907 F. Supp. 896 (E.D. Pa. 1995)(Joyner, J.)(applying the heightened standard), with Marshall v. Dunwoody Village, 782 F. Supp. 1034 (E.D. Pa. 1992)(Giles, J.)(applying the McDonnell standard). Yet, even under the heightened standard, it has been noted that "[t]he prima facie case is not intended to be rigidly applied or difficult to show." Davis, 907 F. Supp. at 900.

I find that plaintiff has made out his prima facie case of discrimination under either standard. Certain managerial employees were commended for having identified minority and female employees as worthy candidates for promotion, and received favorable performance evaluations for so doing. Moreover, in light of the relatively equal ratio of male to female employees, there is a record of disproportionate identification of females and minorities on Promotability and Career Development Forms. More specifically, Weist was allegedly afforded favorable treatment and special accommodations in an effort to strengthen

her qualifications, and make her eligible for promotion.

In its effort to articulate a legitimate, non-discriminatory reason for promoting Weist over the other male candidates, defendant argues that "based on Ms. Weist's performance and her potential for advancement," she was identified "as an individual who would contribute greatly to the achievement of [the Bank's] goals," which included employee training -- an area in which Weist allegedly had experience. Additionally, defendant argues that, as compared to Weist, plaintiff possessed inferior data-analysis and communication skills.

A plaintiff may, however, survive a motion of summary judgment by submitting evidence "from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997)(citations omitted). Whether defendant's proffered explanation is a pretext for reverse discrimination is an unresolved question of material fact. They boldly assert that Weist was more qualified. However, one can reasonably infer as well that her credentials were artificially bolstered, and plaintiff's artificially lowered, in an effort to support this argument. As to that there remains a jury question, and thus,

defendant's motion for summary judgment on the employment discrimination claim must be denied.

B. Retaliation

Plaintiff also claims that defendant retaliated against him after he filed a complaint with the EEOC and PHRA in October, 1995, which alleged that he was denied the promotion to Manager of Financial Services because he is male. Plaintiff specifically alleges that Weist and his other supervisors, harassed, shunned, avoided, and refused to speak with plaintiff, wrote numerous negative memoranda to his Departmental personnel file, downplayed his accomplishments, and magnified his failings. Plaintiff states that such conduct was intended to force him to quit, however, it succeeded only by making plaintiff's working conditions so intolerable that he was forced to transfer out of the Statistics Department.

A plaintiff asserting a retaliation claim must show that (1) he engaged in protected activity, (2) he suffered an adverse employment action subsequent to or contemporaneous with the protected activity, and (3) there is a causal link between the protected activity and the adverse employment action. See Robinson v. City of Pittsburgh, 120 F.3d 1286, 1299 (3d Cir. 1997); Nelson v. Upsala College, 51 F.3d 383, 386 (3d Cir. 1995). Defendant argues that plaintiff has not demonstrated either that

he suffered an adverse employment action, or that such action, if any, was causally connected to his filing of the EEOC/PHRA complaint.

I find that plaintiff has raised a genuine issue of material fact as to whether defendant took retaliatory adverse action against him after he filed his EEOC/PHRA complaint. "Although adverse action by an employer may typically take the form of termination, demotion or transfer, it is not limited to these actions." Clark v. Commonwealth of Penn., 885 F. Supp. 694, 709 (E.D. Pa. 1995). Specifically, "[r]etaliatory conduct other than discharge or refusal to hire is thus proscribed by Title VII only if it alters the employee's 'compensation, terms, conditions, or privileges of employment,' deprives him or her of 'employment opportunities,' or 'adversely affect[s] his [or her] status as an employee.'" Robinson, 120 F.3d at 1300 (citations omitted). "The definition of an adverse employment action under . . . Title VII includes 'any action which already has or which might impair the employee in future employment situations.'" Clark, 885 F. Supp. at 709-10 (quoting Nelson v. Upsala, 51 F.3d 383, 386 (3d Cir, 1995)).

Here, the negative memoranda plaintiff's superiors placed in his personnel file can be considered an adverse employment action. In Nelson, the Third Circuit cited Lazic v. University of Pennsylvania, 513 F. Supp. 761 (E.D. Pa. 1981), a case in

which the plaintiff alleged unlawful retaliation when positive references from her personnel file were deleted after she filed an EEOC charge, as an example of conduct that might impair the plaintiff in employment situations. Nelson, 51 F.3d at 387. That plaintiff's employment records were littered with negative evaluations could cut either way, depending on whether they were the product of unvarnished, truthful candor, or of spiteful, retributive vindictiveness. But that factual question must await the verdict of plaintiff's peers.

As to whether plaintiff has established a causal connection between the filing of his EEOC/PHRA claim and the alleged retaliation, I further find that the evidence, when looked at as a whole, shows a pattern of harassment that began after defendant was served with the complaint. See Kachmar v. Sungard Data Systems, Inc., 109 F.3d 173, 177 (3d Cir. 1997)("circumstantial evidence of a 'pattern of antagonism' following the protected conduct can . . . give rise to the inference [of retaliation]") For example, during the eleven months after defendant was served with plaintiff's EEOC complaint, sixteen memoranda were placed in plaintiff's file whereas only three memoranda addressing his job performance had been place in his personnel file during the previous nine years.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEVEN G. INZAINA, Plaintiff, v. FEDERAL RESERVE BANK OF PHILADELPHIA, Defendant.	Civil Action No.97-1107

ORDER

AND NOW, this day of April, 1998, Defendant's Motion for Summary Judgment is DENIED.

BY THE COURT:

_____

Robert S. Gawthrop, III J.